

STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF THE RULES
OF PROFESSIONAL CONDUCT

MEETING SUMMARY - OPEN SESSION

Friday, April 25, 2008
(9:15 am - 5:00 pm)

SF–State Bar Office
180 Howard Street
San Francisco, CA 94105

MEMBERS PRESENT: Harry Sondheim (Chair); JoElla Julien; Robert Kehr; Stan Lamport; Raul Martinez; Kurt Melchior; Ellen Peck (by telephone); Hon. Ignazio Ruvolo; Jerry Sapiro; Dominique Snyder (by telephone); Mark Tuft; Paul Vapnek; and Tony Voogd.

MEMBERS NOT PRESENT: Linda Foy and Hon. Ignazio Ruvolo.

ALSO PRESENT: Jim Biernat (BASF Liaison); George Cardona (U.S. Attorney, C.D. Cal.); Randall Difuntorum (State Bar staff); John Drexel (State Bar staff); Mimi Lee (State Bar staff); Meg Lodise (Executive Committee, Trusts & Estates Section Liaison) (by telephone); Suzanne Mellard (COPRAC Liaison); Marie Moffat (State Bar General Counsel); Kevin Mohr (Commission Consultant); Toby Rothschild (Access to Justice Commission Liaison); and Peter Stern (Executive Committee, Trusts & Estates Section Liaison).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE FEBRUARY 29 - MARCH 1, 2008 MEETING

The action summary was deemed approved, as amended. (On page 2, item (A)(1) was modified to refer to codrafter consideration of comment language addressing the concept of “a necessary witness.”)

II. REMARKS OF CHAIR

A. Chair’s Report

The Chair reported on the Commission’s presentation at the March 6, 2008 meeting of the Board Committee on Regulation, Admissions and Discipline regarding the 90-day public comment distribution of the Batch 3 rules. The Chair also reported on the plans to hold the Batch 3 public hearing on May 22, 2008 in Sacramento. Mr. Martinez and Ms. Foy were asked to check their availability to serve as the Commission’s representatives. Mr. Sapiro indicated that he could be available if other member’s had scheduling conflicts.

B. Staff's Report

Staff reported the following: Conference of Delegates Resolution No. 01-06-2008 (re amendment to rule 3-310 to prohibit ethical walls); the Board of Governors anticipated consideration of an insurance disclosure rule (proposed rule 3-410) at its meeting on May 17, 2008; Senate Bill No. 1136 (Alquist) (re prohibition against unreasonable fees for legal assistance in obtaining social services); COPRAC proposed opinion 05-0001 (re modification of a fee agreement); COPRAC ethics alert article on rule 3-100; and a proposal to co-sponsor an MCLE program at the State Bar annual meeting with the Inns of Court. Mr. Kehr, Mr. Lampert, and the Chair indicated an interest and availability to serve as the Commission's panelists.

In addition, staff invited COPRAC Liaison, Suzanne Mellard, to give the Commission an update on the May 3, 2008 Annual Statewide Ethics Symposium. Ms. Mellard reported that Mr. Tuft and Mr. Vapnek would be presenting the Commission's panel and that Ms. Peck would be one of the panelists on the program addressing issues of inadvertent disclosure. Commission members were encouraged to attend the symposium.

III. MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES NOT YET DISTRIBUTED FOR PUBLIC COMMENT (ANTICIPATED BATCH 4 RULES)

A. Consideration of Rule 3-100 [ABA MR 1.6 & 1.8(b)] Confidential Information of a Client

The Commission considered Draft 5.1 (dated April 9, 2008) of a discussion draft of proposed amendments to RPC 3-100 [MR 1.6]. The Commission Consultant led a discussion of the open issues and the following drafting decisions were made.

(1) Regarding MR 1.6(b)(2) and (b)(3) (re confidentiality exceptions for preventing and rectifying financial harm), the Commission considered but rejected a motion to include those provisions in rule 3-100 (1 yes, 10 no, 0 abstain).

(2) In paragraph (b), the exception in bracketed subparagraph (5), intended to expressly permit compliance with a "court order" was deleted (5 yes, 4 no, 1 abstain).

(3) In paragraph (b), the Commission considered deleting the exception in subparagraph (3) for so-called "lawyer self-defense" but there was insufficient support to make this change (5 yes, 5 no, 2 abstain).

(4) In Cmt. [ALT-C2], the codrafters were asked to delete the concept of "work product" (6 yes, 0 no, 3 abstain).

(5) In Cmt. [ALT-C2], everything in the title caption after "Client" was deleted (10 yes, 0 no, 0 abstain), so that it reads: "Information Relating to the Representation of a Client."

(6) In Cmt. [ALT-C2], the codrafters were asked to add the concept that "information does not lose the protection it otherwise would have under this rule simply because it is also

covered by the work product doctrine” (8 yes, 0 no, 2 abstain). It was understood that the codrafters would use their discretion in determining where to incorporate this concept within Cmt. [ALT-C2].

(7) In Cmt. [ALT-C2], the Commission considered but rejected a proposal to add the concept that “confidential information related to the representation includes both information communicated in confidence to the lawyer by or on behalf of the client and information covered by the client-lawyer evidentiary privilege”(3 yes, 6 no, 1 abstain).

(8) In Cmt. [ALT-C2], the Commission considered a proposal to begin the comment by describing the information covered by Bus. & Prof. Code sec. 6068(e), but there was insufficient support to make this change (5 yes, 5 no, 1 abstain).

(9) In Cmt. [ALT-C2], the first sentence was revised to read as follows (6 yes, 3 no, 1 abstain): “lawyer-client confidentiality is broader than lawyer client privilege. [CITATIONS].” It was understood that the codrafters could add the concept that confidential information may be obtained from any source.

(10) In Cmt. [ALT-C2], the drafters agreed to draft the comment two different ways, one with privilege discussed first, the other with duty of confidentiality discussed first, and have the Commission members decide their preference.

(11) In Cmt. [ALT-C2], the Commission considered a proposal to delete the third sentence of the meeting draft (re limits on evidence available to a tribunal) but there was insufficient support to make this change (4 yes, 4 no, 3 abstain).

(12) In Cmt. [ALT-C2], the codrafters volunteered to re-work the fourth sentence of the meeting draft, taking account of the consensus to not use the phrase “lawyer’s ethical duty.”

(13) In Cmt. [ALT-C2], there was no objection to the Chair deeming approved the following: the fifth sentence at line #149; the ninth sentence at line #157; the tenth sentence at line #161; the eleventh sentence at line #164; and the twelfth sentence at line #166.

(14) In Cmt. [ALT-C2], the sixth sentence (re obligation to protect information), the codrafters were asked to consider deleting the entire sentence.

(15) In Cmt. [ALT-C2], the seventh sentence (re concept of duty is not limited to information acquired after formation of the lawyer-client relationship), the codrafters indicated that they would incorporate Mr. Kehr’s revisions for the next draft.

(16) In Cmt. [ALT-C2], the eighth sentence, the codrafters indicated that they would delete the phrase “might learn” for the next draft.

(17) All of Cmt. [M5] was deleted as fundamentally inconsistent with the direction of the current discussion draft (7 yes, 2 no, 1 abstain). In addition, the codrafters were asked to consider adding a cross reference to Cmt. [13] of proposed Rule 1.7.

(18) The Commission considered a proposal to delete all of Cmt. [M9] but there was insufficient support to make this change (5 yes, 6 no, 1 abstain).

(19) In Cmt. [M10], the codrafters agreed to revise the language so that it would be limited to only a disciplinary charge initiated by a client as this would be consistent with *Brockway v. State Bar* (1991) 53 Cal.3d 51.

(20) In Cmt. [M13], the codrafters agreed to consider deleting the last sentence. In addition, the Chair directed the drafters to consider further revisions to cmt. [M13] in light of the Commission's decision to delete the phrase "or court order" from paragraph (b)(5), with special consideration of cmt. [C13].

(21) All of Cmt. [M16] was deleted (6 yes, 5 no, 1 abstain).

(22) All of Cmt. [M17] was deleted (8 yes, 4 no, 0 abstain).

Following discussion, the codrafters were asked to implement all of the revisions in a revised draft.

[Intended Hard Page Break]

B. Consideration of Rule 5-210 [ABA MR 3.7] Member as Witness

The Commission considered Draft 3.7 (dated April 9, 2008) of proposed Rule 3.7 [5-210]. The Chair announced that 7 members had indicated a desire to reconsider the applicability of the current draft to both jury and bench trials but that 8 votes would be required to re-open a matter previously resolved by a Commission vote. Ms. Snyder led a discussion of the open issues and the following drafting decisions were made.

(1) The Commission considered a proposal to add a comment explaining the purpose of paragraph (a), but there was insufficient support to make this change (3 yes, 7 no, 2 abstain).

(2) The Commission considered a proposal to add a comment explaining the purpose of paragraph (b), but there was insufficient support to make this change (4 yes, 8 no, 0 abstain).

The failure of the above motions led to a general discussion about the purpose of the rule. Following the Chair's acknowledgment that there was a fundamental disagreement among all of the Commission members concerning the purpose and direction of the current draft, the codrafters were asked to re-institute RPC 5-210 (with the understanding that formatting would be conformed and that the concept of "recusal" would be deleted) in the place of the current draft (7 yes, 4 no, 0 abstain).

[Intended Hard Page Break]

C. Consideration of Rule 5-110 [including all of ABA MR 3.8] Performing the Duty of Member in Government Service

Matter carried over.

[Intended Hard Page Break]

D. Consideration of Rule 5-200 [including all of ABA MR 3.3] Trial Conduct

The Commission considered Draft 5.1 of proposed Rule 3.3 [5-200] (dated April 8, 2008). Mr. Tuft and the Commission Consultant led a discussion of the open issues and the following drafting decisions were made.

(1) In paragraph (a)(2), the phrase "in the controlling jurisdiction" was replaced with "controlling authority in the jurisdiction" (7 yes, 2 no, 1 abstain).

(2) In paragraph (a)(4), and anywhere else that it may be required for conformance, the phrase "or use" was deleted so that the operative standard throughout the rule is offering evidence not using evidence (6 yes, 5 no, 1 abstain).

(3) A recommendation to substitute RPC 5-200 for the current draft did not receive the 8 votes required by the Chair's procedures for reconsidering a matter previously resolved by a Commission vote. (Note the 5 members in favor of reconsideration were: Mr. Melchior; Ms. Peck; Mr. Sapiro; Mr. Voogd; and Mrs. Julien.)

(4) In Cmt. [2], the phrase "allow to be misled" was deleted (7 yes, 4 no, 0 abstain).

(5) In Cmt. [3], by consensus, the following changes were made: the word "matters" was replaced with "fact" at line 58; the phrase "of fact" was added after "assertion" at line 60; the word "assertions" was deleted at line 59; and at the start of line 56, the phrase "An advocate" was replaced with "A lawyer."

(5A) Concerning cmt. [4], the Chair directed the drafters to rewrite the comment in light of the Commission's vote concerning paragraph (a)(2) of the Rule. See ¶. (1), above.

(6) In Cmt. [5], the last sentence was deleted (9 yes, 2 no, 1 abstain). It was understood that this action includes deletion of the related sentence in Cmt.[9]. Ms. Peck asked that her dissent to this action be noted for the record.

(7) In Cmt. [6], the last sentence, the phrase "or otherwise permit the witness to present" was deleted (9 yes, 1 no, 0 abstain). In this same sentence, the word "knowingly" was added before the word "elicit" and the word "false" was added before the word "testimony" (9 yes, 1 no, 0 abstain).

Following discussion, the codrafters were asked to implement all of the revisions in a revised draft.

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E. Consideration of Rule 3-310(D) [ABA MR 1.8(g)] Avoiding the Representation of Adverse Interest (aggregate settlements)

Matter carried over.

[Intended Hard Page Break]

F. Consideration of ABA MR 1.18 Duties to Prospective Client

Matter carried over.

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